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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 646

BROTHERHOOD OF RAILROAD TRAINMEN, H. F. SITES, A. F. WHITNEY, ET AL.,
Petitioners,

vs.

R. E. CONNER, KENNETH L. KNITTER, AND VINCENT L. PETENBRINK, SUING ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

CARL MCFARLAND,
KENNETH L. KIMBLE,
Counsel for Petitioners.

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vs.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

On February 2, 1950, the above-named respondents filed in No. 575, this term, a petition for writ of certiorari to

review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on August 1, 1949. A brief in opposition to that petition is being filed by the above-named petitioners.

Your petitioners here, Brotherhood of Railroad Trainmen and the other petitioners named above, respectfully pray that, in the event the Court grants the petition in No. 575 but only in that event, a writ of certiorari also issue to review that part of the judgment of the Court of Appeals adverse to petitioners.

Opinions Below

The opinion of the Court of Appeals (R. 65-72) is reported in 177 F. 2d 854. The opinion of the District Court (R. 60-62) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1949 (R. 73). Respondents' petition for rehearing was denied on October 5, 1949 (R. 85). On December 29, 1949, Chief Justice Vinson extended petitioners' time for filing this conditional cross-petition to March 4, 1950 (R. 91). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

Whether respondents are entitled to be "tendered" the "opportunity" of transferring back from passenger service to freight service with seniority ahead of those trainmen who entered freight service after respondents left to join the armed forces, where (1) it is obvious they would not have elected such retransfer had they been in the employ of the railroad when the freight vacancies arose, (2) the collective bargaining agreement clearly

indicates that once an employee has transferred from one service to another he has no right to transfer back at will, (3) there was no custom or practice of transferring from passenger to freight service solely on the basis of passenger seniority, (4) respondents have at no time to date requested a transfer back to freight service, and (5) the suggestion that they might desire such retransfer was first made in their amended complaint in this case filed well over a year after they had returned to railroad employment, and even there they do not request retransfer but seek only the "opportunity" so to elect *if* they lose in their attack on the standing of the individual petitioners on the passenger roster.

Statute Involved

The pertinent provisions of the Selective Training and Service Act of 1940 (50 U. S. C. App. 308; 54 Stat. 885, § 8, as amended) are set out in respondents' petition for certiorari in No. 575, and will not be repeated here.

Statement

The pertinent facts are fully set out in the brief in opposition to certiorari filed in No. 575 by the cross-petitioners here. To avoid repetition, we shall merely summarize those facts here.

Both the individual petitioners and the respondents are trainmen employed on the Maryland Division of The Pennsylvania Railroad Company, are veterans of the last war, and were originally employed by the Railroad as freight trainmen (R. 11-12, 14, 18-19). Respondents transferred from freight to passenger service prior to their entry into military service (R. 11-12). The individual petitioners, who went off to war before respondents, made that transfer upon their return from military service, and

were given standing on the passenger roster as of the date they would have been transferred but for their absence (R. 18-19, 44).

In their original complaint, respondents objected only to the individual petitioners' transfer and standing on the passenger roster (R. 1-10). In their amended complaint, however, respondents alleged alternative causes of action with corresponding prayers for alternative relief. First, they asserted that the individual petitioners had been given wrongful seniority on the passenger roster, and prayed for an injunction against continuation of that seniority. Alternatively respondents alleged that, *if they lost on their first cause of action,* they should be tendered the "opportunity" to transfer back to the freight roster with similar antedating seniority and with damages alleged to have resulted from a failure to tender them that opportunity upon their return from military service (R. 22-24). Both of the alleged causes of action are based on certain provisions of the collective bargaining agreement between the Railroad and petitioner Brotherhood concerning the right of transfer from one roster to another (R. 14-17).

Both petitioners and The Pennsylvania Railroad Company filed motions for summary judgment, which the district court granted as to both causes of action (R. 60-63). The Court of Appeals affirmed the judgment for petitioners on the first cause of action, on the ground that under the prevailing contract and established custom the individual petitioners were entitled, in accordance with the provisions of the Selective Training and Service Act of 1940, to standing on the passenger roster as of the date they would have been transferred to that service but for their absence on military duty. With respect to respondents' alternative cause of action, the Court of Appeals held that respondents were not entitled to damages because, fol-

lowing their return from military service, they had never in any way requested transfer from passenger service back to freight service. The Court of Appeals concluded, however, that even though no such request had ever been made, respondents should now be tendered the opportunity to return to the freight roster with seniority ahead of trainmen entering that service while respondents were in the armed forces (R. 65-72).

Specification of Error to Be Urged

The Court of Appeals erred in holding that respondents should now be tendered the opportunity to transfer back to the freight roster with antedating seniority should they so elect.

Reasons for Granting the Writ

We think that for a number of reasons the Court of Appeals was wrong in holding that respondents should be given the opportunity to elect to return to freight service with antedating seniority. *First*, as the district court held (R. 62), it is clear that if respondents had been in the employ of the Railroad at the time the vacancies arose in freight service they would not have elected to transfer back to that service. Rule 3-F-1 of the collective bargaining agreement provides that a trainman who transfers from one service to another retains his seniority on the old roster and acquires seniority on the new one from the date of transfer (R. 16). It is obvious that respondents, having elected earlier to transfer from their senior positions on the freight roster to the bottom of the passenger roster and having thereafter improved their positions on the passenger roster, would not then have elected to return to the bottom of the freight roster, thereby giving up the seniority they retained on the freight roster and the benefit of the seniority they had accumulated on the

passenger roster. *Second,* the provisions of Rule 3-F-1 clearly imply that an employee who has once transferred from one roster to another has no right to transfer back at will. *Third,* as both the district court (R. 62) and the Court of Appeals (R. 71) held, there was never any custom or practice of transferring from passenger to freight service solely on the basis of seniority, as there was in the case of transfer from freight to passenger service. *Fourth,* respondents have never at any time since their return from military duty requested transfer back to the freight service, and did not even make such a suggestion in their original complaint (R. 9-10). The first reference to this matter came in respondents' amended complaint filed December 17, 1947, well over a year after they had returned to private employment and been reinstated on the passenger roster. *Fifth,* even now respondents do not request transfer but ask only the "opportunity" to elect to do so—and then only if they are unsuccessful in their attack on the individual petitioners' standing on the passenger roster (R. 22-24).

While we think the Court of Appeals was wrong in its ruling as to respondents' right of transfer, we do not believe the question is of such importance as to warrant certiorari. As pointed out in our brief in opposition to certiorari in No. 575, we consider all of the other rulings of the Court of Appeals in this case to be both correct and lacking in such importance as to justify certiorari. We think it clear, however, that if this Court should decide to grant certiorari in No. 575, it should also grant this cross-petition for a number of reasons:

(1) The question of respondents' right to retransfer from passenger to freight service is based on Rule 1-D-3 of the collective bargaining agreement (R. 15), as is to some extent the question of the individual petitioners' right to

transfer from freight to passenger service which respondents seek to have reviewed in No. 575. While we do not think this matter of interpretation of a contract is one warranting certiorari, if it justifies review in one case it does in the other.

(2) In their amended complaint respondents assert only that they should be given the opportunity to transfer to freight service with antedating seniority if the individual petitioners are permitted to retain their positions on the passenger roster (R. 23-24). The judgment of the Court of Appeals now directs that respondents be tendered that opportunity (R. 70-71, 73). Obviously it would be most unjust for this Court at the request of respondents to consider depriving the individual petitioners of their positions on the passenger roster, without at the same time having the entire judgment of the Court of Appeals before it so that it could similarly deprive respondents of the right to transfer which is now given them by the judgment of the Court of Appeals.

(3) The question of respondents' right to transfer is of course closely related to the question of their right to damages which they seek to have reviewed in No. 575. Much of respondents' argument for certiorari on the damages issue is in fact based on the ruling of the Court of Appeals that they have a right to transfer (Petition in No. 575, pp. 19 et seq.). As we show in our brief in opposition to that petition, there are numerous arguments in support of the holding of the Court of Appeals on damages even aside from the initial question of whether respondents have any right of transfer at all. It is manifest, however, that if they have no right of transfer they are entitled to no damages. Thus if this Court is to review the damages issue it should at the same time review the question of the right to transfer without which there could be no right to damages.

Conclusion

For the foregoing reasons it is respectfully submitted that, in the event this Court should grant the petition for writ of certiorari in No. 575 but only in that event, this conditional cross-petition for writ of certiorari should likewise be granted.

CARL MCFARLAND,
KENNETH L. KIMBLE,
Counsel for Petitioners.

March 4, 1950.